



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 1336 OF 2001**  
**R M K.....PLAINTIFF**  
**-VERSUS -**  
**NATIONAL BANK OF KENYA LTD.....DEFENDANT**  
**JUDGEMENT**

1. The plaintiff, **R M K**, was the wife of **J F K**, who was the registered proprietor of **L.R No. [...]** and **L.R. No. [...]**.
2. The plaintiff describes the suit property as being her matrimonial property.
3. It is common ground that at all material times, the plaintiff lived with her husband and their children, upon the suit property.
4. As at the time the suit was filed in court, on 31<sup>st</sup> August 2001, until the time when the trial of the case was concluded, on 30<sup>th</sup> November 2016, the plaintiff was in actual occupation of the suit property.
5. It is common ground that **J F K** entered into various Agreements with the defendant, **NATIONAL BANK of KENYA LIMITED**. Pursuant to those Agreements, the defendant advanced financial facilities to J.
6. The security which J provided to the bank, in relation to the financial facilities accorded to him or to **SCHEMES LIMITED** were Mortgages and Further Mortgages over **L.R. No. [...]** and **L.R. No. [...]**.
7. It is the plaintiff's case that the said Mortgages and Further Mortgages were invalid, wrongful, unlawful, ineffective and unenforceable due to the fact that the plaintiff's Equitable Interest in the said suit property.
8. The plaintiff had asserted that she had an equitable interest in the suit property, as it constituted her matrimonial property.
9. In the light of that equitable interest, the plaintiff asserted that the defendant should have ensured that she had knowledge of and had consented to the use of the suit property as security. As she had no knowledge of the said use, and because she had not consented to the suit property being used as security, the plaintiff submitted that the Mortgage and Further Mortgage were unenforceable.

10. She blamed the bank for having been both negligent and fraudulent.
11. The plaintiff said that the bank had actual and constructive notice of her equitable interest in the suit property, but it still did not seek her consent before accepting the said property as security.
12. At the time when the title of the suit property was mortgaged, the plaintiff was outside the country. That fact, coupled with the fact that her husband was no longer residing in the suit property when he offered it as security, led the plaintiff to read fraudulent mischief in the actions of both the bank and her husband.
13. At the very least, the plaintiff considers the bank to have been recklessly indifferent to the illegality which was being perpetuated by J F K.
14. The plaintiff asked the court to declare that the Mortgage and Further Mortgage registered against the title of the suit property, were null and void.
15. She also sought a declaration that her equitable interest in the suit property was free from the defendant's interest.
16. Thirdly, the plaintiff sought a permanent injunction to restrain the defendant from advertising, auctioning, alienating, disposing of in any way interfering or dealing with the suit property.
17. The bank had lodged a Defence, denying the plaintiff's claims. However, the said Defence was struck off the record, after the defendant had failed to comply with the court orders, directing it to make available to the plaintiff, some specified documents.
18. During the trial, two witnesses testified for and on behalf of the plaintiff. However, following the striking out of the Defence, no witnesses testified for the defendant.
- 19. PW1, R M K**, is the plaintiff. She testified that the suit property was purchased in the year 1966.
20. Her evidence was that the purchase was done by both herself and her husband, J K.
21. The money which was used to purchase the property was said to have belonged to the family. However, the title of the property was registered in the name of J alone.
22. The plaintiff said that she used to run a small cottage industry, which provided the family with the much needed household income, whilst her husband grew his business.
23. Although the property was registered in her husband's name, the plaintiff insisted that her husband held it in trust for her.
24. According to the plaintiff, she was shocked in 1981, when she learnt that her husband had obtained a mortgage from the National Bank of Kenya. She learnt of that development when the bank had caused an advertisement to be carried in a newspaper, indicating that the suit property would be sold by public auction.
25. During cross-examination, the plaintiff said that she had not challenged the legal mortgages earlier because she had been unaware about them.
26. The plaintiff told the court about the relationship between her family and that of **MR. S G**. The said G was the husband of E K, who is a sister to J K.
27. S G also happened to be, first, a Manager, and later the Executive Chairman of the National Bank of Kenya.

28. The plaintiff testified that S G personally sanctioned an overdraft facility of Kshs. 2,000,000/- to Schemes Limited, which was to be secured by the suit property. As the plaintiff had personally asked Mr. G not to lend money to her husband, she believes that the bank colluded with her husband, with the intention of defrauding her of the suit property.

29. She further testified that her husband moved out of the matrimonial home in 1980. Therefore, when he offered the said property as security for a further facility which the bank provided to Schemes Limited, the plaintiff's conclusion was that that conduct was fraudulent.

30. I find that the plaintiff had personally asked Mr. G not to lend any more money to her husband. Mr. G was, at the material time, a Manager at the National Bank of Kenya. Later, Mr. G became the Chief Executive Officer of the National Bank.

31. However, the plaintiff talked to Mr. G in a social setting, when he had visited the plaintiff's home for functions involving friends and relatives.

32. In the circumstances, I am unable to conclude that the message from the plaintiff was intended to reach the defendant. S G was not the personification of the defendant.

33. In my considered view, if the plaintiff intended to communicate with the defendant, she could have done so directly, and in a formal manner.

34. The danger of communicating serious messages, intended for the bank, through a family friend who was visiting you during an informal function, is that it may be difficult to later verify that the message was relayed when the recipient was in an appropriate state of mind and that thereafter, the said recipient delivered the message to the bank.

35. If J K and S G had fraudulent intentions, of depriving the plaintiff of the suit property, the plaintiff has not demonstrated that the bank had similar intentions.

36. It was the evidence of the plaintiff that the defendant fraudulently and negligently provided financial facilities to her husband, and accepted the suit property as security.

37. The basis for that assertion was that the bank neither sought her consent nor even provided her with information prior to accepting the suit property as security.

38. I have already held that there was no proof that the bank was fraudulent.

39. The next question, therefore, is whether or not the bank was negligent.

40. In my considered view, if the bank was under an obligation to notify the plaintiff and to obtain her consent before accepting the suit property as security, it would constitute serious negligence if the bank either failed to discharge that obligation.

41. But the bank asserts that that issue had already been determined by the court in **R M K Vs J F K, Hccc No. 3772 of 1981**. Therefore, the bank submitted that that issue was *res judicata*.

42. The defendant cited the following words from the judgement of Hon. Lady Justice E. Owour, to show how the court determined the issue;

**“It is a fact that the Karen property has a substantial Mortgage on it. The bank has in fact sold part of this property. If I am not wrong, the rest of the property has not been sold because of the order of this Court. This case started way back in 1981, and the husband made certain undertakings to try and pay up the loans so as to free the matrimonial home. I am not aware the loan has been paid. The National Bank of Kenya has an interest in this property. This court cannot make an order that will affect the position of the Bank when**

**they are not a party to the proceedings. It was not pleaded that the Court should make a declaration of the plaintiff's rights as against any other party except her husband".**

43. According to the defendant, the plaintiff had already asserted in that earlier case that the mortgages were obtained without her consent or approval or knowledge.

44. Such consent, approval or knowledge, if the same had been given, would mean that the plaintiff would have had no reason to complain either in the previous suit or in this case.

45. But, did the court determine that issue, as between the plaintiff and the Bank?

46. In my understanding of the paragraph from the judgement, as cited by the defendant, the Court expressly declined to make any order which could affect the Bank or any other person who was not a party to that case. Therefore, there was no declaration or order made which could affect the rights of the Bank *vis-a-vis* the plaintiff and the suit property.

47. In effect, *res judicata* did not arise.

48. Indeed, it is for the same reason that the court cannot be said to have determined the validity of the mortgages. Such a determination would constitute a declaration of the rights of a person who was not a party to those earlier proceedings: and that is the very thing which the court declined to do.

49. The plaintiff was thus entitled to invite this court to make a determination of her rights as against the Bank. By bringing this suit, the plaintiff was not carrying out a collateral attack on the decision in **Hccc No. 3772 of 1981**. She was asking this court to make a determination on an issue which was not determined in that case.

50. Justice E. Owuor did make an express finding that the suit property is matrimonial property, and that the plaintiff has an Equitable Right over it.

51. Although the Bank was not a party to the case **Hccc No. 3772 of 1981**, that decision remains firmly in place.

52. Secondly, the plaintiff is in actual possession of the suit property. The evidence adduced before me shows that she and her children have been in actual possession of the suit property at all material times.

53. It is clear that from as early as 1981, the plaintiff was aware that the suit property was mortgaged to the Bank. Therefore, it was possible for her to have challenged the mortgage from that year.

54. If looked at from that perspective alone, this suit would be time-barred, because it was instituted in 2001.

55. But it is important to take note of the fact that this suit was prompted by the defendant, when it served the plaintiff with a Notification of Sale dated 15<sup>th</sup> August 2001.

56. By giving Notice of its intention to exercise its Statutory Powers of Sale, the defendant was asserting its legal right over the suit property.

57. In the face of the said assertion of right, the plaintiff was entitled to bring this suit.

58. Therefore the cause of action accrued from 15<sup>th</sup> August 2001 when the defendant issued the Notification of Sale. That is because the Mortgage was still subsisting against the title, and the defendant was threatening to exercise its rights under the mortgage.

59. Was the mortgage void?

60. At the material time when the plaintiff's husband executed the mortgage, there was no legal requirement that the mortgagee should obtain the concurrence of the registered proprietor's spouse.

61. I also find no illegality in the mortgage.

62. If anything, the mortgage is valid. Therefore, in answer to the plaintiff's case, I find that the mortgage and further mortgage are Not null and void.

63. However, the said mortgage and further mortgage are subject to the plaintiff's equitable rights, which were declared by Justice E. Owuor in **Hccc No. 3772 of 1981**.

64. In effect, the defendant holds a valid security, in the form of the mortgage and further mortgage, but it cannot ignore nor override the plaintiff's prevailing equitable rights in the suit property. To that extent, the plaintiff's suit is successful.

The costs of the suit are awarded to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of March 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of:**

Miss Misere for the Plaintiff

Wanjohi for the Defendant

Collins Odhiambo – Court clerk.